

EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT LUCIA

SLUHCVAP2016/0027

BETWEEN:

FIRST CARIBBEAN INTERNATIONAL BANK (BARBADOS) LIMITED

Appellant

and

SUNSET VILLAGE INC.
(In Liquidation)

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste

Justice of Appeal

The Hon. Mde. Louise Esther Blenman

Justice of Appeal

The Hon. Mr. Mario Michel

Justice of Appeal

Appearances:

Ms. Renee T. St. Rose for the Appellant

Mr. Colin J.K Foster for the Interested Parties

Mr. Anwar Brice for the Liquidator

2018: July 4;
September 20.

Civil appeal – Liquidation – Sale of property – Distribution of proceeds of sale – Secured and unsecured creditors – Creditors ranking pari passu – Hypothecary – Judicial hypothec – Money secured by hypothec – Receivership – Bankruptcy – Commercial Code – Companies Act – Civil Code of Saint Lucia – Consent orders – Incorporation of English law – Section 11(1) of the Supreme Court Act – Reception of English law – Whether learned judge erred in holding that the creditors should rank pari-passu in the distribution of the proceeds of sale

The appellant, First Caribbean International Bank Limited (“**FCIB**”) loaned the respondent, Sunset Village Inc. the sum of US\$5,000,000.00 to assist with 40% of the construction of 60 residences at Beausejour, Gros Islet, Saint Lucia. FCIB obtained a hypothecary

obligation mortgage debenture and a floating **charge over Sunset Village Inc.'s property as security** for the loan. The hypothecary obligation was registered in 2007. Sunset Village Inc. failed to repay the bank or to complete the construction of the houses. As a consequence of its default in the repayment, Sunset Village Inc was first placed under receivership.

Interested parties who had paid Sunset Village Inc. for the houses obtained judicial hypothecs for the sums that they had paid. Some of the creditors including the interested parties have sued Sunset Village Inc. and obtained judgments. FCIB was unable to realise the substantial hypothecs for the sums of money that it had lent to Sunset Village Inc. and filed a petition to place Sunset Village Inc in liquidation. A winding-up order was granted by the High Court and Mr. Oliver Jordan was appointed as the liquidator. He was able to sell the immovable property of Sunset Village Inc.

for EC\$6.5 Million and the court discharged all the hypothecs and cautions held by the interested parties.

Mr. Jordan applied to the court for directions on the distribution of the proceeds of sale since both FCIB and other secured creditors were claiming the proceeds of sale. The issue before the judge at first instance was to determine to whom, after the payment of the **liquidator's fees, should the remaining proceeds of sale be paid and if not all to FCIB, then** on what footing should the other creditors, who have proved their debts, be paid.

The learned judge held that in considering a combination of the Eastern Caribbean Supreme Court Act as well as the Companies Act and the Commercial Code resort must **be had to the United Kingdom's Insolvency Act 1986** and Insolvency Rules. The learned judge held, as a consequence, that the distribution of payments of the proceeds of sale shall rank equally or pari-passu among the secured creditors in the case of an insolvent company, such as Sunset Village Inc. and she so ordered.

Being dissatisfied with the learned **judge's** decision, FCIB appealed, contending among other things that the learned judge erred in law when she resorted to the laws of the United Kingdom in particular the Insolvency Act and Insolvency Rules in her determination of the proper ranking of FCIB vis a vis the other secured creditors. They also complained that the learned judge failed to have regard to the relevant laws of Saint Lucia regarding registration of real rights in respect of the Civil Code of Saint Lucia, and the Commercial Code and that she failed to give regard to the hypothecary obligation mortgage debenture and floating charge registered by FCIB against the assets of Sunset Village Inc.

The interested parties, who are also secured creditors have counter appealed against the decision of the learned judge and are seeking a number of declarations.

Held: allowing the appeal; dismissing the counter appeal; ordering that FCIB is entitled to receive the proceeds of sale of the assets of Sunset Village Inc. in priority to the other secured creditors and ordering that each party shall bear its own costs, that:

1. It is not open to any local court to import the substantive statutory provisions of the United Kingdom into the laws of that country. The English law that is intended to

be imported by section 11 of the Supreme Court Act (St. Lucia) is the procedural law, which is adjectival and purely ancillary to English substantive law. The learned judge had no jurisdiction to seek to import the Insolvency Act 1986 and Insolvency Rules of England and Wales into Saint Lucia to resolve the issues that were before her. Accordingly, the learned judge erred in so doing.

Panacom International Inc v Sunset Investments Ltd et al (1994) 47 WIR 139 applied; Veda Doyle v Agnes Deane Grenada Civil Appeal No. 20 of 2011 (delivered 16th April 2012, unreported) applied; Sections 6 and 11 of the Eastern Caribbean Supreme Court (Saint Lucia) Act Cap. 2:01 Revised Laws of Saint Lucia 2013 applied.

2. Local courts may import the English common law but not statutory provisions. Article 917A imports only the English common law in relation to obligations and not the English statutory provisions on limitation.

Article 917A of the Civil Code Cap. 4.01 Revised Laws of Saint Lucia applied; Nelson and Others v First Caribbean International Bank (Barbados) Limited [2014] UKPC 30 applied.

3. The consent orders became judicial hypothecs and nothing further. There is nothing in them, without more, which indicate that they rank in priority to the claims of FCIB in the liquidation. The consent orders predated the liquidation process and therefore fall outside the liquidation process. Furthermore, there is nothing that suggests that in the Deed of Appointment FCIB contracted away its priority in clause 3.
4. If there is a cause of preference, the proceeds of the property are not shared by creditors proportionately to the amount of their debts. The debenture of FCIB is a legal cause of preference and is a real right. The debenture of FCIB took effect from the moment of its registration against creditors whose rights have been registered subsequently or not at all. Real rights rank according to the date of **their registration and therefore FCIB's** debenture ranks ahead of all other registered real rights and therefore judicial hypothecs, of all interested parties and its debenture was a duly registered mortgage charge against the property of Sunset Village Inc. **FCIB's** hypothecary obligation mortgage debenture and floating charge is entitled to receive the proceeds of sale of assets of Sunset Village Inc. (In Liquidation) in priority to the other secured creditors.

Articles 1876, 1908, 1912, 1913, 1932, 1941, 1967, 1968 and 2011 of the Civil Code Cap 4.01. Revised Laws of Saint Lucia 2013 applied; Section 464 Companies Act Cap. 13.01 Revised Laws of Saint Lucia 2013 applied; Articles 572 and 573 of the Commercial Code Cap. 13.31 Revised Laws of Saint Lucia 2013 applied; Jitendra Nath Singh v Official Liquidator and Others Civil Appeal No. 6755 of 2012 Civil Appellate Jurisdiction of the Supreme Court of India considered; section 529 Companies Act 1956 of India considered; section 317 of the Companies Act 1948 of the United Kingdom considered.

JUDGMENT

[1] BLENMAN JA: This is an appeal against the judgment of a learned judge ordering that First Caribbean International Bank (Barbados) Limited (“FCIB”) shall rank equally, in the distribution of the proceeds of sale of Sunset Village Inc. (in liquidation) with the other secured creditors, after payment of the liquidators expenses. FCIB was a creditor of Sunset Village Inc. (in Liquidation). FCIB is **dissatisfied with the judge’s decision and has appealed against it. The other secured creditors, who are referred to as the interested parties in this appeal, defends the judge’s decision and argue that it is correct.** For his part, the liquidator says that he takes a very neutral stand in this appeal, even though his **written submissions endorse the judge’s decision.**

[2] There is also the counter notice of appeal by the interested parties, in which they are mainly seeking a number of declarations. Chief among which is that the consent orders that were entered into by the Receiver/Manager prior to Sunset Village Inc. being placed in liquidation fall into the category of expenses and preferential payments by virtue of the operation of the Companies Act,¹ the Civil Code² of Saint Lucia and the relevant United Kingdom Legislation. They also seek a declaration that any residual liquidity of assets after the above expenses and preferential payments are made, should be distributed equally to all of the secured creditors. In effect, they contend that FCIB is not entitled to any priority in the distribution of the proceeds of sale of Sunset Village Inc. They say that the judge correctly concluded that the creditors shall rank pari-passu. FCIB vigorously opposes the counter notice of appeal.

[3] I will now address the background in some detail.

¹ Cap. 13.01 Revised Laws of Saint Lucia 2013.

² Cap. 4.01 Revised Laws of Saint Lucia 2013.

Background

- [4] FCIB loaned Sunset Village Inc. the sum of US\$5,000,000 to assist with 40% of the construction of 60 residences at Beausejour, Gros Islet, Saint Lucia. The sum was payable over a three-year term. Security for the loan was, among other things, by way of a hypothecary obligation mortgage debenture and floating charge in favour of the bank to cover US\$5,000,000 and was registered on **Sunset Village Inc.'s** property in the Land Registry. At the time of **FCIB's** loan, Sunset Village Inc. was unencumbered and therefore FCIB held the first charge over its property.
- [5] FCIB obtained a hypothecary obligation mortgage debenture and a floating **charge over Sunset Village Inc.'s property as security for the loan.** The hypothecary obligation was registered in 2007.
- [6] Sunset Village Inc. purported to be in the business of constructing and selling houses and entered into a number of contracts with various intended purchasers of the houses. It failed to repay the bank or to complete the construction of the houses.
- [7] As a consequence of its default in the repayment, Sunset Village Inc was first placed under receivership and Mr. Oliver Jordan ("**Mr. Jordan**") was appointed as Receiver/Manager. It seems as though the Receiver/Manager was unable to realise the security, due to a number of claims that were filed against the company and the existence of registered judicial hypothecs, since during the receivership, the interested parties who had paid Sunset Village Inc. for the houses obtained judicial hypothecs for the sums that they had paid. Some of the creditors have sued Sunset Village Inc. and obtained judgments.
- [8] FCIB was unable to realise the substantial hypothecs for the sums of money that it had lent to Sunset Village Inc. and filed a petition to place Sunset Village Inc

in liquidation. This was granted by a winding-up order of the High Court. Mr. Jordan was appointed as the liquidator, by virtue of an order of the High Court. He was able to secure the sale of Sunset Village Inc. (in liquidation) for EC\$6.5 Million and discharged all of the hypothecs and cautions held by interested parties.

[9] Mr. Jordan filed an application for directions in the High Court and sought the following orders in relation to the proceeds of sale:

- (a) The sum of \$6,500,000 be disbursed as follows - \$643,298 in professional and other fees in relation to the liquidation; and
- (b) The balance to be determined by the Court.

[10] In support of his application for directions from the High Court, Mr. Jordan deposed in an affidavit, and indicated that: (a) FCIB holds a mortgage and submitted a claim for approximately EC\$13 million dollars as of June 27th 2012; (b) a number of purchasers in Sunset Village Inc. obtained judicial hypothecs and judgments totalling EC\$11.3 million; and (c) that three other purchasers have submitted regular claims or have registered cautions against the company to the extent of EC\$8.3 million.

[11] I turn now to the issue that arose to be determined by virtue of the application for directions.

Issues before court at first instance

[12] The issue before the judge at first instance was determining to whom, after the **payment of the liquidator's fees, should the remaining proceeds of sale be paid** and if not all to FCIB, then on what footing should the other creditors, who have proved their debts, be paid.

[13] FCIB asserted, that its debt being registered first in time, should be given priority over that of other secured creditors. The interested parties did not dispute the

payment of the liquidator's fees but contended that their debt should rank equally or pari-passu with that of FCIB.

Judgment at first instance

[14] The learned judge held that in considering a combination of the provisions of the Eastern Caribbean Supreme Court Act,³ specifically sections 6 and 11, as well as sections 377(1) and (2), 387, 399 and 552 of the Companies Act and in recognizing that the Commercial Code⁴ only made provision for bankruptcy and not winding up, the conclusion is that resort **must be had to the United Kingdom's Insolvency Act 1986⁵ (the "Insolvency Act")** and the Insolvency Rules⁶ where the Companies Act is silent.

[15] In addition to the Companies Act, and the Civil Code, the learned judge felt able to rely on the Insolvency Act and Insolvency Rules of England and Wales, in particular section 107 of the Insolvency Act, to conclude that the distribution of payments shall rank equally or pari-passu among the secured creditors in the case of an insolvent company (as obtained in the case at bar).

[16] I turn now to the grounds of appeal

Grounds of Appeal

[17] FCIB being dissatisfied with the decision of the judge that all creditors shall rank pari-passu once they have proven their debts against Sunset Village Inc. (in Liquidation), has filed several grounds of appeal. The main thrusts of their appeal are as follows:

- (a) The learned judge erred in law when she resorted to the laws of England and Wales in her determination of the proper ranking of FCIB vis -a-vis the other secured creditors;

³ Cap. 2.01 Revised Laws of Saint Lucia 2013.

⁴ Cap. 13.31 Revised Laws of Saint Lucia 2013.

⁵ Insolvency Act 1986, United Kingdom.

⁶ Insolvency Rules 1986 SI 1986/1295 United Kingdom.

- (b) The learned judge erred in law when she failed to have regard to the laws of Saint Lucia regarding the registration of real rights and the ranking thereof and failed to give consideration to the Civil Code; and
- (c) The learned judge erred in law when she failed to have regard to the hypothecary obligation mortgage debenture and floating charge registered by FCIB against the assets of Sunset Village Inc. prior to any secured charges and the entitlement to receive the proceeds of sale of the assets of the company in priority to any other creditors.

[18] With no disrespect intended to the interested parties, the counter notice of appeal for the most part refers to the grounds in the notice of appeal except for paragraphs 8 and 9 which state as follows:

“8. The Companies Act Cap 13.01 of the Revised Laws of Saint Lucia does make provision for a receiver to compromise, settle and enter into arrangements in respect of Claims by or against the company namely sections 287 (b) (iii), 297 (1) (a) and (b). Priority in ranking is determined under section 297, 462, 465 (1) (a), (b) and (c) and 465 (2), (3) and (4) of the Companies Act. Simply the Learned Judge made reference to UK legislation and which the Learned Judge is entitled to do by virtue of Articles 917 (a) of the Civil Code of Saint Lucia Cap 4.01 of the Revised laws of Saint Lucia which makes for provision of the reception and operation of the Laws of England relevant to contracts, quasi contracts and torts where our law is silent. Further the Companies Act has no supported (sic) insolvency rules and neither does the Saint Lucian jurisdiction embody an insolvency act...

9. Accordingly, it is the Interested Creditors contention that **the Appellant's** Notice of Appeal exhibits no grounds of appeal whatsoever and if it does, such grounds should be dismissed.”

Issues on Appeal and Counter Appeal

[19] The following principal and interrelated issues can be distilled from the above grounds of appeal and counter appeal:

- (a) Whether the learned judge erred as a matter of law when she purported to import into the laws of Saint Lucia, the Insolvency Act and the Insolvency Rules, in her determination of the issues before

the High Court; and

- (b) Whether the learned judge erred as a matter of law when she purported to rely on the Insolvency Law of England in concluding that FCIB should rank pari-passu with the other creditors in the distribution of the assets of Sunset Village Inc. in liquidation.

Issue I - Importation of UK Laws into Saint Lucia

[20] Learned Counsel, Ms. St. Rose, on behalf of FCIB, said that the judge erred when she imported the statutory provisions and rules of the United Kingdom namely the Insolvency Act and Insolvency Rules, into the laws of Saint Lucia and relied on them in resolving the issues that were before the court of first instance.

[21] Learned Counsel, Ms. St. Rose, stated that section 11 of the Eastern Caribbean Supreme Court Act does not provide for the importation of the law of the United Kingdom to determine the rights of creditors in relation to privileges and liens. She said that article 5 of the Civil Code of Saint Lucia clearly states that these should be determined in accordance with the laws of Saint Lucia. Ms. St. Rose also submitted that section 11 of the Eastern Caribbean Supreme Court Act would also be inapplicable in the case at bar, since the court at first instance was only required to determine the rights, distribution and ranking of the creditors and not the practice to be followed for the determination of the proceedings.

[22] Learned Counsel, Mr. Brice, on behalf of the liquidators opined that by a reading of the combination of sections 6 and 11 of the Eastern Caribbean Supreme Court Act, sections 377 (1), (2), 387, 399 and 552 of the Companies Act were relevant and since, in his view the Commercial Code only made provision for bankruptcy and not winding up, one must therefore turn to the **United Kingdom's** Insolvency Act and the Insolvency Rules where the Companies Act is silent.

[23] For his part, learned Counsel Mr. Foster, on behalf of the interested parties, said that the judge was correct to rely on the Insolvency Act and Insolvency Rules in

the absence of any provision in the Civil Code of Saint Lucia, Commercial Code and the Companies Act that addresses the circumstances in the case at bar. He therefore argued that the learned judge quite properly relied on the Insolvency Act and Insolvency Rules in resolving the issues that were before the court.

[24] In relation to the counter notice of appeal, learned Counsel Mr. Foster suggested that article 917A of the Civil Code of Saint Lucia provides for the importation of legislation. Ms. St. Rose quite correctly opposed this suggestion and pointed out that article 917A provides only for the importation of the common law and not English statutory provisions. I am in entire agreement with Ms. St. Rose in relation to the scope and application of article 917A of the Civil Code of Saint Lucia. It only enables the local court to import the common law of England and not the statutory provisions of England and Wales. Support for this position is obtained from the decisions of *Nelson and Others v First Caribbean International Bank (Barbados) Limited*⁷ in which it was held as follows:

“Article 917A provides no alternative answer as it imports only the English common law in relation to obligations and not the English statutory **provisions on limitation.**”

[25] The other issue of whether section 11 of the Eastern Caribbean Supreme Court Act enabled the learned judge to import into Saint Lucia the statutory laws of England and Wales is really a short point.

Discussion

[26] This is a very short point. Years ago there was an ongoing debate as to whether section 11 of the Eastern Caribbean Supreme Court Act enables a local court such as the Saint Lucia High Court to import the substantive law of England and Wales into the law of Saint Lucia. This matter has been put to rest. Indeed, in *Panacom International Inc. v Sunset Investments Ltd. et al*⁸ Sir Vincent Floissac, Chief Justice (as he then was) stated at page 149 quite clearly as follows:

⁷ [2014] UKPC 30.

⁸ (1994) 47 WIR 139.

“Section 11 of the Supreme Court Act relates solely to the manner of the exercise of the jurisdiction of the High Court. It is therefore an intrinsically procedural provision. The words ‘provision’, ‘provisions’, ‘law’ and ‘law and practice’ appearing in section 11 are evidently intended to be references to procedural (as distinct from substantive) law.”

[27] Clearly it is therefore not open to any local court, by reliance on section 11 of the Eastern Caribbean Supreme Court Act, to seek to import the substantive statutory provisions of England and Wales into the laws of that country. In a word, the English law that is intended to be imported by section 11(1) of the Supreme Court Act is the procedural law, which is adjectival and purely ancillary to English substantive law. In this regard, I am guided by the very helpful pronouncements of Sir Vincent Floissac in *Panacom* and can do no more than apply them to the case at bar.

[28] Of recent times, in *Velda Doyle v Agnes Deane*,⁹ the above principles were judicially acknowledged and applied by the learned Chief Justice Pereira. The principles that were distilled from *Panacom* are as good today as they were yesterday.

[29] Accordingly, it is evident that the learned judge had no jurisdiction to seek to import the Insolvency Act and Insolvency Rules of England and Wales into Saint Lucia to resolve the issues that were before her. The learned judge erred in so doing. FCIB therefore succeeds on the first issue.

[30] This brings me now to address the second issue.

Issue II - Creditors to rank *pari-passu*

[31] Learned Counsel, Ms. St. Rose, submitted that the judge erred in law when she failed to give consideration to the Civil Code of Saint Lucia and to the other relevant laws of Saint Lucia including the Commercial Code and the

⁹ Grenada Civil Appeal No. 20 of 2011 (delivered 16th April 2012, unreported).

Companies Act, regarding the registration of real rights and the ranking thereof. She therefore urged this Court to set aside the order of the judge and substitute an order which gives effect to the priority of the charge that is held by FCIB and to indicate that FCIB should be paid first in time and ahead of the other creditors.

[32] Ms. St. Rose reminded this Court that there is no dispute as to the date of registration of the various charges against **Sunset Village Inc's assets**. She highlighted the fact that **FCIB's** hypothecary obligation mortgage debenture and floating charge were registered on 19th December 2007 and filed at the Registry of Companies and Intellectual Property on 29th May 2008. This was many years before the registration of the interested parties' **judicial hypothecs**.

[33] Ms. St. Rose posited that the Civil Code and the Companies Act of Saint Lucia are adequate and sufficient to address the issue of ranking and the priority of the creditors, in the case at bar. She said that the Companies Act does not repeal the provisions of the Civil Code but in fact are complimentary to them. Next, Ms. St. Rose said that the distribution of the proceeds of any sale of the assets of Sunset Village Inc. (in Liquidation) should be undertaken in accordance with the Companies Act, the laws of bankruptcy through the relevant provisions of the Commercial Code and the Book of Registrations of Real Rights under the Civil Code. Ms. St. Rose also submitted that had the learned judge done so, she would have concluded that FCIB ought to have ranked prior to the other secured creditors for payment of the debts.

[34] Learned Counsel Ms. St. Rose further stated that the judge erred in law when she failed to have regard for the hypothecary obligation mortgage debenture and floating charge that was registered by FCIB against the assets of Sunset Village Inc., prior to any other secured charges, and with that, the entitlement of FCIB to receive the proceeds of sale of the assets of the company during the liquidation process, in priority to any of the other creditors.

[35] Accordingly, learned Counsel, Ms. St. Rose urged this Court to order that the creditors of Sunset Village Inc (in Liquidation) shall be paid in accordance with the registration and ranking of hypothecs provided for in the Civil Code and the Commercial Code. She said that, in the case at bar, in order to determine the ranking of the secured creditors, regard must be paid to the Civil Code, the Companies Act and the Commercial Code.

[36] In response, learned Counsel Mr. Foster mainly took points in objection to **FCIB's contention in relation to the second issue. However, and of importance** is the fact that for his part, learned Counsel Mr. Foster stated that the judge correctly applied the relevant provisions of the Insolvency Act and Insolvency Rules of England and Wales. Learned Counsel Mr. Foster argues that the interested parties who possess consent orders against Sunset Village Inc. ought to rank equally or pari-passu with FCIB and should share equally. He also said that the interested parties who hold judicial hypothecs are in a similar position.

[37] Alternatively, learned Counsel Mr. Foster argued that the consent orders which were entered into between the Receiver/Manager and the relevant interested parties possess the status of expenses. He sought to rely on the hypothecary obligation mortgage debenture and floating charge by Sunset Village Inc in favour of FCIB and the Deed of Appointment of the Receiver/Manager of Sunset Village Inc. He said that clause 7 (b) (xvii) of the former expresses the priority of payment of expenses over and above payments due to FCIB towards all interest, charges and principals due to the Bank under **FCIB's hypothec.**

[38] Also, Mr. Foster referred to paragraph 1 (c) of the Deed of Appointment which conferred all of the rights, issues and duties on the Receiver/Manager given by a debenture or otherwise on the Receiver/Manager.

[39] Mr. Foster referred this Court to clause 3 of the Deed of Appointment under the

heading “**APPLICATION OF MONIES**” where it stated as follows:

“**All Monies received by the RECEIVER/MANAGER, after providing for all costs, charges and expenses of, and incidental to, the exercise of any of their powers (including legal fees) shall be applied in and towards the satisfaction of any and all obligations, debts and liabilities of THE DEBTOR to THE BANK, subject to the laws of Saint Lucia and those claims given priority under the laws of Saint Lucia.” (Emphasis mine)**

[40] He said that based on the above clause 3 of the Deed of Appointment, **FCIB’s** debt should not rank in priority to those of other creditors. Mr. Foster stated that **FCIB’s hypothec reflects the Deed of Appointment. He posited that** they also indicate the priority for the application of the funds that are realised from the sale of the assets of Sunset Village Inc (in Liquidation) should rank pari-passu.

[41] Mr. Foster was adamant that all fees, charges and other expenses that were incurred during the course of the initial receivership are to be regarded as expenses of the Receiver/Manager and are to be paid in the liquidation process and in priority to those charges of FCIB. In fact, he said that **FCIB’s hypothec** and the Deed of Appointment dictate that expenses are to be paid in priority to **FCIB’s interest charges and principals**. It is clear that Mr. Foster even went further than the judge in asserting that, by virtue of article 975 of the Civil Code, the consent orders are to be treated in priority over and above **FCIB’s hypothec** and should be honoured first. He therefore urged this Court to dismiss **FCIB’s** appeal and grant the interested parties the declarations they seek.

[42] Learned Counsel, Mr. Brice, provided comments on the submissions that were advanced on behalf of FCIB and those that were advanced on behalf of the interested parties. Quite properly, Mr. Brice reminded this Court that a Receiver/Manager was appointed prior to Sunset Village Inc. being placed in liquidation and that it was only on the court having granted the petition to wind up Sunset Village Inc. that the liquidator was appointed by the court of first instance.

[43] Learned Counsel, Mr. Brice, accepted that the winding up order enabled the liquidator to sell the property and to distribute the proceeds of sale after the **payment of the liquidator's professional fees and expenses.**

[44] Learned Counsel, Mr. Brice, disagreed with the interested parties that all fees, charges and other expenses incurred in the course of the receivership are to be regarded as expenses of the Receiver/Manager and are to be paid in priority to the secured creditors in the liquidation. Mr. Brice correctly pointed out that the application/appeal at bar deals solely with the liquidation of Sunset Village Inc. I agree. This much is self-evident. Without the need for any expansion, the interested parties' argument in this regard is entirely misconceived. In addition, the contentions that the liquidator, in the former capacity as Receiver/Manager, had entered into legal relations with the creditors by virtue of the consent orders only needs to be stated so as to be respectfully rejected. In addition, it is noteworthy that learned Counsel Mr. Foster did not present this Court with any authority for his proposition that the expenses and charges of the Receiver/Manager that were incurred during the receivership phase should rank in priority before the secured creditors claims in the liquidation of Sunset Village Inc.

[45] Equally, I am of the view that, as submitted by Mr. Brice, the consent orders became judicial hypothecs and nothing further. There is nothing in them, without more, which indicate that they rank in priority to the claims of FCIB in the liquidation.

[46] In light of the above observations, it is apparent that I do not accept the interested parties' **submissions on the effect of the consent orders.** Neither am I of the view that they are expenses that fail to be considered within the liquidation process. In fact, it is clear that the consent orders predated the liquidation process and therefore fall outside of it. The liquidation of necessity treats with the expenses that are within the liquidation process. I agree with Mr. Brice that

there is no basis for treating the consent orders otherwise, than for what they are related to, namely, the period before the company went into liquidation. For the sake of completeness, it is worth noting that clause 3(c) of the Deed of Appointment upon which the interested parties sought to rely in an effort to support their assertions that their claim should be given priority over FCIB, specifically states that regard must be had to the laws of Saint Lucia for the purpose of determining the issue of priority. Accordingly, I do not find any support in the Deed of Appointment for the position that was argued by Mr. Foster, namely, that FCIB contracted away its priority in clause 3 of the Deed of Appointment. It is implausible that any financial institution that is engaged in loaning such a substantial sum of its money would include a clause in the Deed of Appointment that would have the effect of depriving itself of priority to the proceeds of sale on the winding up of the debtor. Especially in circumstances where it has loaned such substantial sums of money as FCIB lent to Sunset Village Inc.

[47] I now look closer at the matter of the pari-passu distribution.

[48] It is important to indicate that pari-passu distribution is derived from the maxim that **'equality is equity'**. Halsbury's Laws of England¹⁰ states as follows:

"The maxim that equality is equity expresses in a general way the object both of law and equity, namely to effect a distribution of property and losses proportionate to the several claims or to the several liabilities of the persons concerned. Equality in this connection does not necessarily mean literal equality, but may mean proportionate equality...Thus, in the distribution of property, the highest equity is to make an equality between parties standing in the same relation, though this cannot be done contrary to the plain meaning of a deed."

[49] It is against that backdrop that I will now address in detail the second and primary issue that arises to be resolved. In seeking to resolve the second issue, it must be borne in mind that FCIB's **debenture was registered** for the first time on 19th December 2007 and all of the other creditors were registered

¹⁰ Halsbury's Laws of England, 4th Edition, Vol. 16 at para. 747.

long after FCIB's. At the heart of the second issue is FCIB's **contention that the** proceeds of sale should be distributed firstly to itself in priority to all other secured creditors. The balance, if any, should be paid to the other secured creditors in accordance with the date of registration of their hypothecs. In so doing, I bear in mind that it is common ground that the liquidator is entitled to be paid his professional fees and expenses before the proceeds of sale are distributed to the secured creditors.

Legislative Framework and discussion

[50] In order to test the veracity or otherwise of **FCIB's** contention, it is necessary to refer to the relevant legislative framework. In this regard, reference must, of necessity, be made to the Civil Code, the Commercial Code and the bankruptcy laws as well as the Companies Act.

[51] At the date of winding up of the company, FCIB was, by the debenture, the holder of: (1) A registered hypothec; (2) a mortgage debenture; and (3) a crystallized floating charge over all of the assets of the company. The effect of these charges was to give FCIB a first charge over all assets of the company.

[52] I remind myself that article 1876 of the Civil Code provides that: "The property of a debtor is the common security of his creditors, and in the absence of any cause of preference, its proceeds are shared by them proportionately to the amount of their debts." **Article 1877 provides that "The legal causes of preference are privileges and hypothecs."**

[53] Article 1908 of the Civil Code provides that:

a "**Hypothec is a *real right***, and is a charge upon immovables specially pledged by it for the fulfilment of an obligation, in virtue of which charge the creditor may cause the immovables to be sold in the hands of whomsoever they may be, and has a preference upon the proceeds as fixed by this Code."

[54] Article 1912 of the Civil Code provides that a "Hypothec may be either legal,

judicial, or conventional.”

[55] Article 1913 of the Civil Code provides that a “Legal hypothec is that which results from the law alone. Judicial hypothec is that which results from judicial acts. **Conventional hypothec results from agreement.**”

[56] It is not disputed that FCIB holds a conventional hypothec and the interested parties hold judicial hypothecs (resulting from the judgments).

Section V - The order in which Hypothecs Rank

[57] This part of the Civil Code commences at article 1932 and states:

“As between the creditors, hypothecs rank in the order of their respective dates, when none of them have been registered in conformity with the provisions contained in the Book respecting *Registration of Real Rights*.”

[58] Article 1941 provides that “Creditors having a registered privilege or hypothec upon an immovable may follow it into whatever hands it passes and cause it to be sold judicially in order to be paid out of the proceeds, according to the order of their claims.”

[59] Article 1967 of the Civil Code commences “Book eighteenth on the Registration of Real Rights” **and its effect. Article 1967 states that** “Registration gives effect to real rights and establishes their order of priority according to the provisions contained in this Book.”

[60] Article 1968 of the Civil Code **states that** “All real rights subject to be registered take effect from the moment of their registration against creditors whose rights have been registered subsequently or not at all...”

[61] Article 2011 of the Civil Code is the order of preference of real rights. It provides:

“Privileged rights which are not subject to registration take precedence according to their respective rank.

Rights subject to registration and which have been registered within the prescribed delays, take effect according to the provisions contained in the preceding Chapter.

Except the above cases and the case of article 1977, real rights rank according to the date of their registration...”

- [62] Based on the above provisions of the Civil Code read together with provisions of the Companies Act, the following principles can be distilled: (i) The property of Sunset Village Inc. is the common security of its creditors and in the absence of a cause of preference, they are shared equally to the amount of their debts. (ii) However, if there is a cause of preference, the proceeds of the property are not shared by them proportionately to the amount of their debts. (iii) The debenture of FCIB is a legal cause of preference and is a real right. The creditors of Sunset Village Inc. are entitled to cause the property to be sold judicially to be paid out of the proceeds, according to the order of their claims. The debenture of FCIB took effect from the moment of its registration against creditors whose rights have been registered subsequently or not at all. Real rights rank according to the date of their registration and therefore FCIB’s debenture ranks ahead of all other registered real rights and therefore judicial hypothecs, of all interested parties.
- [63] I turn now to further examine the effect of the FCIB hypothecary obligation mortgage debenture and floating charge.
- [64] Hypothecs are not provided for under the Companies Act as they relate solely to the registered charge against immovables. FCIB’s **charge** was however registered pursuant to section 250 of the Companies Act and remains a valid fixed charge against the company. The registered charge is also characterised as a debenture under the Companies Act.
- [65] Section 28(1) and (2) of the Companies Act provides that a debenture holder and holder of a floating charge can realise its security if a company defaults in

the payment of its debts and among other events, if the company has gone into liquidation. It is very common in debentures and other similar instruments, that are to be repaid on a fixed date, to provide that that date will be accelerated in certain events. An example of such an event would be if a petition is presented for winding up by the court of the issuer. It is a basic principle of insolvency that every debt or liability capable of being expressed in money terms should be eligible for proof. It is trite that the law of insolvency began with personal bankruptcy.

[66] It is clear that the mortgage debenture provides a fixed charge against the assets of the company which it is given. In this case, the debenture provided a fixed charge against all present and future property of Sunset Village Inc. The floating charge provides a charge over the assets of the company until such time as there is an event of default, when this charge crystallises into a fixed charge. In this case, the floating charge became fixed under the debenture on the date demand was issued by FCIB against Sunset Village Inc. The floating charge then created a first fixed charge against all of the property of the company.

[67] While section 287 of the Companies Act allows a debenture holder to proceed to realise its security, the security cannot be realised by a debenture holder other than in accordance with the Civil Code and Code of Civil of Procedure by way of effecting a judicial sale or filing a claim for a hypothecary action. This is so, particularly in cases where there are junior creditors or other hypothec holders. In this regard, I refer to *1st National Bank St. Lucia Ltd. v St. Honore de Ste Lucia Limited (in Receivership)*.¹¹

[68] In my view, the provisions of the Civil Code and the Companies Act are complementary in relation to the dissolution of corporations.

¹¹ SLUHCVP2013/0030 (delivered 15th January 2015, unreported).

[69] Section 399 of the Companies Act provides that **“For the purposes of** conducting the proceedings in winding-up a company and performing such duties in reference thereto as the court may impose, the court may appoint a liquidator or liquidators.”

[70] In my judgment, the intention of the winding up of a company is clear from section 407 of the Companies Act which makes provisions for the exercise of the powers of the liquidator in the winding up of a company. It provides that in managing the estate of the company, the procedure that the liquidator is to follow and the matters which he or she should take into account in the distribution of the assets to the creditors, there is an obligation on the liquidator to do this in keeping with the rights of the creditors, conferred by the Civil Code and by the Companies Act.

[71] Section 464(1) of the Companies Act states:

“In every winding-up, subject in the case of insolvent companies to the application in accordance with the provisions of this Act and the law of bankruptcy, all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company, a just estimate being made, so far as possible, of the value of such debts or claims as are subject to any contingency or sound only in damages or for some other reason do not bear a certain value.”

[72] The above section provides that claims shall be admissible to proof. I agree **that FCIB’s claim is proved by virtue of the** debenture registered as a first fixed charge and it has substantiated its claim to the liquidator which has not been disputed.

[73] Section 464(2) of the Companies Act states:

“Subject to section 465, in the winding-up of an insolvent company the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable and to

the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt, and all persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding-up, and make such claims against the company as they respectively are entitled to by virtue of this section.”

[74] The above section provides that the law of bankruptcy in force at the time in respect to the estates of persons adjudged bankrupt shall prevail and be observed. The learned judge in her judgment stated that the Commercial Code only made provision for a bankruptcy and not a winding-up and resorted to the Insolvency Act and Insolvency Rules of the United Kingdom. This is incorrect as the section expressly states that it would be the law of bankruptcy with respect to the estates of persons adjudged bankrupt that is applicable in winding up proceedings.

[75] It is evident that section 464(2) of the Companies Act is very similar to the repealed section 317 of the Companies Act 1948 of the United Kingdom and section 529 of the Companies Act 1956 of India¹², **save that it provides for “the Law of Insolvency” and not “the Law of Bankruptcy”**. The section was interpreted by the Court of Appeal of the Supreme Court of India in *Jitendra Nath Singh v Official Liquidator and Others*¹³ where the court stated at paragraph 5 that:

“A plain reading of clause (c) of sub-section (1) of Section 529 makes it clear that in the winding up of an insolvent company, the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent. This would mean that the respective rights of secured and unsecured creditors of an insolvent company, which is being wound up, will be the same as the respective rights of secured and unsecured creditors with respect to the estates of persons adjudged insolvent as are in force under the law of insolvency. In the State of Jharkhand, the Provincial Insolvency Act, 1920

¹² Act No. 1 of 1956 of India (Repealed by the Companies Act 2013, Act No. 18 of 2013 of India Section 325.).

¹³ Civil Appeal No. 6755 of 2012 Civil Appellate Jurisdiction of the Supreme Court of India.

(for short ‘the Insolvency Act’) is in force and accordingly the respective rights of secured and unsecured creditors with respect to the assets of the insolvent company being wound up will be the same as in the Insolvency Act.”

- [76] In my view, section 464 (2) of the Companies Act maintains the rights of secured and unsecured creditors and specifically **refers to the “law of bankruptcy.”** A review of the law of bankruptcy as it pertains to the estates of persons adjudged bankrupt indicates that it likewise preserves the rights of secured and unsecured creditors.
- [77] It is of significance that the law of bankruptcy defined **“secured creditor” as a “person holding a mortgage charge or a lien on property of the debtor or any part thereof as a security for a debt due to him or her from the debtor”.**¹⁴ Even though the law of bankruptcy does not provide for hypothecs, article 1908 of the Civil Code defined a hypothec as a charge upon immovables and is therefore a lien. Therefore, I agree with FCIB that its debenture was a duly registered mortgage charge against the property of Sunset Village Inc.
- [78] A close reading of the relevant provision of Article 572 of the Commercial Code in relation to bankruptcy indicates that the essence of the law of bankruptcy as it relates to secured creditors is to recognise the interest of the secured creditor against the assets of the bankrupt and to provide the rules that the trustee should observe in so doing. A secured creditor under the law of bankruptcy is able to realise its security and obtain full satisfaction of the second debt and it is only the surplus which will go into the hands of the liquidator. I am fortified in the above view from the perusal of article 572 of the Commercial Code, which provides for a secured creditor to either realise its assets or surrender it and if it is not realised or surrendered, which is the case here, the creditor is entitled to be paid in priority from the sale of the security and to thereafter claim any balance from the general pool of the creditors and

¹⁴ Section 543 of Cap. 13:31 Commercial Code Laws of Saint Lucia 2008.

in so doing provides for the claims of mortgagees and privileged creditors and also provides for the mortgagees and privileged creditors to be paid in priority. It is common ground that FCIB is also a mortgagee under article 572. It **therefore follows that FCIB's** hypothec being first in time is entitled to priority over the other secured creditors.

[79] Article 573 of the Commercial Code then provides for payment of debts in relation to the balance of claims of secured creditors and unsecured creditors and provides for them to rank *pari passu*. This is of course after observing the respective rights of secured and unsecured creditors provided for in article 572.

[80] In my judgment, in construing section 464 of the Companies Act and articles 572 and 573 of the Commercial Code in relation to several creditors, this Court has also to give effect to the Civil Code and the order ranking provided for in article 2011 as well as the provisions of articles 1876, 1967 and 1968, which indicate that the proceeds of the sale of property are to be shared by creditors subject to the legal causes of preference and therefore the order ranking under article 2011.

[81] The cumulative effect of the provisions of the Civil Code, the Commercial Code and the Companies Act is to clearly **indicate that FCIB's** hypothecary obligation mortgage debenture and floating charge is entitled to receive the proceeds of sale of assets of Sunset Village Inc. (in Liquidation) in priority to the other secured creditors. It is clear to me also that the Court ought to take note of and give effect to the purpose and intent of section 464(2) of the Companies Act, in preserving the respective rights of secured and unsecured creditors.

[82] In the case at bar, applying the provisions of section 464 of the Companies Act, articles 572 and 573 of the Commercial Code as well as articles 1876, 1967, 1968 and 2011 of the Civil Code, the ineluctable conclusion which is

arrived at is that the learned judge erred in holding that the creditors should rank pari-passu in the distribution of the proceeds of sale of the assets of Sunset Village Inc (in Liquidation). Accordingly, the appeal is allowed and the order of the learned judge is set aside. The counter appeal is dismissed in its entirety.

[83] I observe that, in the court of first instance, the learned judge made no order for costs and in this Court FCIB did not seek any order for costs. In any event, I am of the view that based on the totality of circumstances the appropriate cost order is that each party should bear its own costs. I so order.

Conclusion

[84] For the foregoing reasons, I would make the following orders and declaration:

- (a) **FCIB's appeal against the judgment of the learned judge is allowed.**
- (b) The interested parties counter appeal against the judgment of the learned judge is dismissed.
- (c) First Caribbean International Bank (Barbados) Limited, the holder of a floating charge is entitled to receive proceeds of sale of the assets of Sunset Village Inc (in Liquidation) in priority to the other secured creditors.
- (d) Each party shall bear its own costs.

[85] I gratefully acknowledge the assistance of all learned Counsel.

I concur.
Davidson Kelvin Baptiste
Justice of Appeal

I concur.
Mario Michel
Justice of Appeal

By the Court

Chief Registrar